

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MONIQUE GRIMES, as Personal
Representative of the Estate of
Damon Grimes, deceased

Plaintiff,

v

TROOPER MARK BESSNER,
TROOPER ETHAN BERGER, and
SGT. JACOB LISS,

Defendants.

Geoffrey N. Fieger (P30441)
James J. Harrington IV (P65351)
Danielle L. Dezbor (P79488)
Stephanie L. Arndt (P66870)
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No. 2:17-cv-12860

consolidated with

Case No. 17-cv-13580

HON. GERSHWIN A. DRAIN

MAG. ELIZABETH A. STAFFORD

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**MOTION TO COMPEL REASONABLE HOURLY RATE FOR
DEPOSITIONS OF PLAINTIFF'S EXPERTS**

For the reasons stated in the accompanying brief, Defendants Ethan Berger and Jacob Liss, by counsel, move for an order compelling four of Plaintiff's experts to provide a reasonable hourly rate for their upcoming depositions. Concurrence in the relief requested was sought. The movant explained the nature of the motion and its legal basis, but concurrence was not forthcoming. E.D. Mich. LR 7.1(a). As the first of the implicated depositions is set for January 28, 2020, Defendants request expedited consideration.¹

Respectfully submitted,

/s/ John G. Fedynsky
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Dated: December 12, 2019

¹ Defendants' counsel is available at the Court's convenience for a telephone conference to discuss this discovery dispute. If the Court prefers full briefing and a formal hearing, counsel due to upcoming holiday schedules would request, in order of preference, January 8, January 7, or January 9, 2020. Counsel thanks the Court for its consideration of this scheduling request.

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**BRIEF IN SUPPORT OF MOTION TO COMPEL
REASONABLE HOURLY RATE FOR
DEPOSITIONS OF PLAINTIFF'S EXPERTS**

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should this Court enter an order compelling four of Plaintiff's experts to provide a reasonable hourly rate for depositions expected to last 1-2 hours, as opposed to a flat rate that is excessive and unreasonable?

STATEMENT OF FACTS

In this excessive force case, Plaintiff has six retained expert witnesses who have provided written opinions in the following areas of expertise:

1. Thomas Easley – materials science and engineering (analysis of whether the taser probes conducted electricity during the incident)
2. Ken Katsaris – use of force/police procedures
3. Timothy Robbins – accident reconstruction/crash causation
4. Gerald Shiener – non-economic damages of Damon Grimes, psychiatric evaluation of Monique Grimes
5. Werner Spitz – forensic pathological analysis, non-economic damages
6. Michael Thomson – economic damages

Plaintiff has provided dates and locations for the discovery deposition of each expert. However, a dispute about reasonable hourly rates has arisen for the depositions of Katsaris, Shiener, Spitz, and Thomson. (11/18/19 E-mail Correspondence, Ex. 1.) Each charges a flat rate or an hourly minimum that will likely exceed the 1-2 hours of time that Defendants' counsel expects will be needed to depose each witness:

Katsaris – \$2,500 for a five-hour minimum. (Katsaris Fee Schedule, Ex. 2.)

Shiener – \$1,000 for the first 90 minutes, \$500 per hour thereafter. (Shiener Fee Schedule, Ex. 3.)

Spitz – \$3,000 flat fee for a half day. (Spitz Fee Schedule, Ex. 4.)

Thomson – \$1,500 minimum fee for two hours, \$750 per hour thereafter. (Thomson Fee Schedule, Ex. 5.)

To maximize the convenience of these witnesses, counsel has agreed to travel and depose them at their preferred locations on the following dates:

January 28, 2020 – Spitz at his office in St. Clair Shores, MI

February 10, 2020 – Shiener at his office in Birmingham, MI

February 17, 2020 – Thomson at Fieger Law in Southfield, MI

February 27, 2020 – Katsaris at a court reporting service in Tallahassee, FL

Counsel also attempted to negotiate reasonable hourly rates for the 1-2 hours of deposition time anticipated for each witness. But an agreement could not be reached. (11/20/19 E-mail Correspondence, Ex.

6.) For the reasons stated below, this Court should enter an order compelling each of these witnesses to only charge a reasonable hourly rate for time actually spent at his deposition answering Defendants' questions.

DISCUSSION

The rules contemplate a rule of reason for compensating adverse experts for discovery depositions.

Unless manifest injustice would result, the court must require that the party seeking discovery:

- (i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and
- (ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions. Fed. R. Civ. P. 26(b)(4)(E).

It is unreasonable to pay a flat rate that exceeds the actual time spent in deposition. In this district, there is persuasive case law holding that an excessive flat rate for an expert deposition is not reasonable.

Alvarado v. Oakland County, E.D. Mich. No. 09-1431 (Jan. 26, 2011).²

In *Alvarado*, Magistrate Mona Majzoub collected the relevant case law and determined that a flat rate of \$2,300 per day plus expenses was not reasonable in light of the expert's usual \$200 hourly rate for professional services. *Id.* It was also noted that for the convenience of the witness the deposition would occur by video conference about 45 minutes from his office. *Id.* Nor, as an academic and consultant, did he face the prospect of lost revenue due to time that could have been spent with patients.³

² Attached as Exhibit 7, and also available at 2011 WL 282683.

³ In this case, only Shnier treats patients, and that dynamic has been accommodated via his request of a 4:00 p.m. start time at his office for his deposition.

Alvarado further noted the rule that “[a]n expert’s hourly rate for professional services is presumptively a reasonable hourly rate for deposition.” *Id.* (citing *Barrett v. Nextel Communications, Inc.*, 2006 U.S. Dist. LEXIS 10262 * 6, 2006 WL 374757 (E.D. Mich., Feb. 16, 2006); *Craft v. Allstate Ins. Co.*, 2008 U.S. Dist. LEXIS 42393, 2008 WL 2224122 (E.D. Mich., May 29, 2008); *Another Step Forward v. State Farm Mutual Automobile Ins. Co.*, 2007 U.S. Dist. LEXIS 90826 *22, 2007 WL 4357726 (E.D. Mich., Dec. 10, 2007)). Consistent with this decisional authority, and under the circumstances presented here, the Court should compel the four expert witnesses to only charge for deposition time at a reasonable hourly rate equal to his hourly rate for professional services. (Fee Schedules, Exs. 2-5.) It is not reasonable for an expert to “charge more for the inconvenience in rearranging schedules and the added intensity involved in giving testimony in court or at a deposition.” *Craft*, 2008 WL 2224122 at *1 (E.D. Mich., May 29, 2008). Best efforts have been made to accommodate the schedule of each witness. Their reasonable compensation should be limited to a reasonable hourly rate for the 1-2 hours each is expected to spend at his deposition.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully request that the Court grant this motion, enter an appropriate order, and grant any other appropriate relief. In particular, the Court's order should compel the following:

- (1) An hourly rate of \$500 for Katsaris,
- (2) An hourly rate of \$500 for Shiener,
- (3) An hourly rate of \$750 for Spitz, and
- (4) An hourly rate of \$750 for Thomson.

Respectfully submitted,

/s/ John G. Fedynsky

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Dated: December 12, 2019

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on December 12, 2019, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ John G. Fedynsky

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